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SUPREME COURT, U.S.

No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRY MICHAEL MINCEY,

Petitioner,

versus

STATE OF GEORGIA,

Respondent.

83-5389

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

Michael R. Hauptman  
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57 Forsyth Street, N.W.  
Atlanta, Georgia 30303  
404/525-4110

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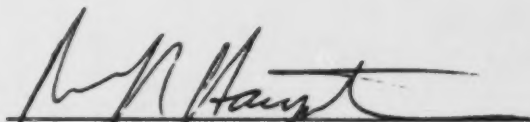
83-5389

MOTION FOR LEAVE TO PROCEED IN  
THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,



Michael R. Hauptman  
Counsel for Petitioner  
Suite 1613  
57 Forsyth Street, N.W.  
Atlanta, Georgia 30303  
404/525-4110

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AFFIDAVIT OF ATTORNEY IN SUPPORT OF  
MOTION TO PROCEED IN FORMA PAUPERIS

I, Michael R. Hauptman, being first duly sworn, deposes and states that I am the attorney for the petitioner in the above entitled matter, that in support of petitioner's motion to proceed in this action for a writ of certiorari to the Supreme Court of Georgia without being required to prepay fees, costs or give security therefore, I state that because of petitioner's poverty he is unable to pay the costs of said proceeding or to give security therefor.

I further swear that the information stated below regarding the ability of petitioner to pay the costs of proceeding herein are true to the best of my knowledge and belief.

-1-

The petitioner is not presently employed. He has been incarcerated since April 13, 1982. Prior to that time, petitioner had various odd jobs, but no regular employment.

-2-

Petitioner has received within the past twelve months no income from a business, profession or other form of self-employment. He has received nothing in the form of rent payments, interest, dividends or moneys from any other source.

-3-

Petitioner has no cash and has no checking or savings account.

-4-

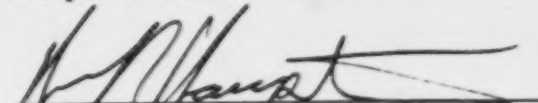
Petitioner owns no real estate, stocks, bonds, notes, automobiles, or other valuable property excluding ordinary household furnishings and clothing.

-5-

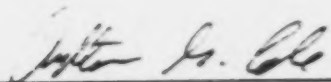
There are no persons who are dependent upon the petitioner for support.

-6-

That counsel was appointed to represent petitioner at the trial of his case and in his appeal to the Georgia Supreme Court. That I am not charging, nor receiving any fees with regarding my representation of petitioner in t is case.

  
Michael A. Hauptman

Subscribed to and sworn to  
before me this 16th day of  
September, 1983.

  
\_\_\_\_\_  
Notary Public  
My Comm. Expires on 12/31/85

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This Court should Grant review to determine whether the pronounced misconduct by the prosecutor in his closing argument during the guilt/innocence phase of petitioner's capital trial violated petitioner's Fifth, Eighth and Fourteenth Amendment rights.

1

This Court should grant review to determine whether the trial court's denial of petitioner's motion to preclude the death penalty as a possible penalty violated petitioner's Eighth and Fourteenth Amendment rights.

3

This Court should grant review to determine whether the trial court's denial of petitioner's motion for funds for investigation violated petitioner's Sixth and Fourteenth Amendment rights.

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY MICHAEL MINCEY,

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versus

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PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

Petitioner, Terry Michael Mincey, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Georgia, entered on July 7, 1983, rehearing denied July 21, 1983.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Georgia is set out in 221 Ga. 255, \_\_\_\_\_ S.E.2d \_\_\_\_\_, (1983), and is set out in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

Nor shall he be compelled in any criminal case to be a witness against himself...

The Sixth Amendment to the Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed,...

The Eighth Amendment to the Constitution provides:

Excessive bail shall not be required, nor excessive

finer imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution provides in relevant part:

Nor shall any State deprive any person of life, liberty, or property, without due process of law...

This case also involves the following provisions of the Official Code of Georgia Annotated, the texts of which are set out in Appendix B:

O.C.G.A., § 17-10-30 (formerly Ga. Code Ann., § 27-2534.1)

O.C.G.A., § 17-10-31 (formerly Ga. Code Ann., § 26-3102)

O.C.G.A., § 17-10-36 (formerly Ga. Code Ann., § 27-2538)

O.C.G.A., § 17-8-75 (formerly Ga. Code Ann., § 81-1009)

#### QUESTIONS PRESENTED

1) Whether the pronounced misconduct by the prosecutor in his closing argument during the guilt/innocence phase of petitioner's capital trial violated petitioner's Fifth, Eighth, and Fourteenth Amendment rights?

2) Whether the trial court's denial of petitioner's motion to preclude the death penalty as a possible penalty violated petitioner's Eighth and Fourteenth Amendment rights?

3) Whether the trial court's denial of petitioner's motion for funds for investigation violated petitioner's Sixth and Fourteenth Amendment rights?

#### HOW THE ISSUES WERE RAISED BELOW

The constitutional issues in the questions presented were raised on appeal to the Supreme Court of Georgia which affirmed petitioner's sentence of death.



### STATEMENT OF THE CASE

Petitioner was convicted for the offenses of murder, armed robbery, and aggravated battery. The death penalty was imposed for the murder conviction. Appellant was indicted on April 17, 1982. (R-2) Inasmuch as appellant is not raising any attack upon his conviction as it relates to weight or sufficiency of evidence, a statement of the manner in which the offenses occurred is not necessary for the purposes raised in this petition.

After indictment, two attorneys were appointed to represent petitioner in the trial court proceedings. Numerous pretrial motions were filed in the case, the rulings on two of these motions are raised in this petition.

Appellant was placed on trial on August 23, 1982, and was convicted and sentenced to death on August 26, 1982.

A Motion for New Trial was filed on September 24, 1982. (R-122) An amendment to the Motion for New Trial was filed on November 12, 1982 (R-131), which amendment outlined specific complaints to be addressed by the trial court in addition to the general grounds. A further amendment to the Motion for New Trial was filed on November 20, 1982 (R-136), which amendment dealt with newly discovered evidence. Another amendment to the Motion for New Trial was filed on December 3, 1982, (R-141), which amendment dealt with failure to disclose statements of the petitioner made while in custody.

Extensive hearings were held on the Motion for New Trial as amended (MK-Transcript) and, on December 10, 1982, the trial court overruled petitioner's Motion for New Trial as amended. (R-142)

Trial counsel for both the petitioner and the State agreed upon a special designation of transcripts which will be outlined here. Pretrial matters are transcribed at MA through MH. Voir dire proceedings were transcribed in the three volume transcript preceded by the letter J. Trial proceedings after voir dire examination are designated by a three volume transcript preceded by the letter T. Post trial proceedings

begin at Transcript MI and continue through the two volume transcript MK dealing with the hearing on the Motion for New Trial.

### REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

1) THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE PRONOUNCED MISCONDUCT BY THE PROSECUTOR IN HIS CLOSING ARGUMENT DURING THE GUILT/INNOCENCE PHASE OF PETITIONER'S CAPITAL TRIAL VIOLATED PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The District Attorney in his closing argument during the guilt/innocence phase improperly commented on petitioner's failure to testify. The language objected to appears at T-357 line 13 as follows:

Is there anything wrong with a Judge or a District Attorney making a recommendation that would say that at least on the third count of these three counts a man who comes in and tells the truth should get somewhat better treatment than a man who refused to tell the truth?

In context, the District Attorney was explaining the necessity of favorable treatment for Jenkins and Jones, petitioner's co-defendants at trial. But in his effort to do so crossed the line and constituted comment upon the petitioner's failure to testify at trial. Counsel objected to the improper argument at T-416 during the trial court's review of those portions of Georgia's unified appeal checklist which pertained to the conduct of the trial itself. Counsel's objection begins at line 8 of that page. At line 17, the court expressed the opinion that the prosecutor had not argued as contended by the defense and conducted no further inquiry into the matter. In effect then the court overruled petitioner's objection to this improper argument. Petitioner contends that overruling this objection was error which violated his Fifth, Eighth, and Fourteenth Amendment rights, which should require the granting of a new trial.

The defendant in a criminal case cannot be compelled to testify and his failure to do so will create no presumption against him. More importantly, no one may comment directly or indirectly on the accused's failure to testify. Spann vs. State, 126 Ga. App. 370, 372, (1972). The trial court

has an affirmative duty to prevent improper argument. Brown vs. State, 110 Ga. App. 401, 407 (1964). An improper comment may be grounds for a mistrial if the prejudicial effect of the comment cannot be removed from the jury's mind. O.C.G.A., § 17-8-75. In order to make improper argument a basis for appellate review, counsel must object to the comment or invoke a ruling from the Court. Joiner vs. State, 208 Ga. 435 (1951). It is not, however, essential that a motion for mistrial be made; objection to the argument alone is sufficient. Mims vs. State, 188 Ga. 702, (1938); Brooks vs. State, 183 Ga. 466 (1936).

To reverse because of improper comment, at least one of the following must be found: one, that the prosecutor's intention was to comment on the defendant's failure to testify; or two, that the nature and character of the comment was such that the jury would necessarily and naturally consider it a comment on the accused's failure to testify. Ranger vs. State, 249 Ga. 315, 319 (1982) (quoting U.S. vs. Rochan, 563 F.2d 1246, 1249 (5th Circuit, 1977)). Petitioner is not required to show that the jurors actually did construe the improper statement to mean that reference was made to the accused's failure to testify; he need only show that the jurors could have so construed the statement. Spann vs. State, supra.

The prosecutor's comment in line 17 quoted above with reference to a "a man who refused to tell the truth" clearly refers to petitioner and falls within either prong of the test stated in Ranger. With regard to express intention to so comment on failure to testify, petitioner is unable to conjure up an equally plausible explanation for the statement. There is none. The prosecutor clearly referred to petitioner and did so with the express intention to call the jury's attention to his failure to tell the truth in contrast with his assertion that Jones and Jenkins did tell the truth at trial. It was an attempt to discredit petitioner in the eyes of the jury and is plainly prohibited. Woodard vs. State,

234 Ga. 901, (1975); Roberts vs. State, 231 Ga. 395 (1973).

Petitioner also asserts that the comment would naturally be interpreted by the jury to be a remark concerning petitioner's failure to testify. Again, the reference was made expressly toward petitioner and contrasted him with his co-defendants. There is no way the jury could have failed to interpret the remark as a comment on his failure to testify at trial. This is the exact type of statement that the Fifth, Eighth and Fourteenth Amendments prohibit.

2) THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO PRECLUDE THE DEATH PENALTY AS A POSSIBLE PENALTY VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This section of petitioner's petition deals with "death penalty motions" which were filed and heard pretrial. (R-21, R-58, R-64, R-67). Two of these motions, those challenging death qualification and the constitutionality of the Georgia statute providing for the death penalty, were summarily overruled on July 2, 1982. (R-74). The Motion to Exclude the Death Penalty As Cruel and Unusual Punishment was date July 8, 1982, and entered after funds for an evidentiary presentation were denied. (R-77)

The court erred in summarily overruling the Motion Challenging Death Qualification of Jurors during voir dire. That motion attacked this practice on two grounds. First, such a procedure results in a unrepresentative jury by virtue of a substantial segment of the community being excluded from service. Secondly, this procedure results in a jury which is more conviction prone than a non-death qualified jury. The court summarily denied this motion because to grant it would, in its opinion, require it to overrule Witherspoon vs. Illinois, 391 U.S. 510 (1968).

While this Court in Witherspoon did reject a similar argument, it left open the possibility that future scientific data might well support petitioner's argument that death qualification results in a conviction prone jury. Witherspoon, supra, at 518. This court in Witherspoon examined two scientific